No. 95-1025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS DALTON, Director of the Arkansas Department of Human Services, in his official capacity; KENNY WHITLOCK, Deputy Director of the Arkansas Division of Economic and Medical Services, in his official capacity; JIM GUY TUCKER, Governor of the State of Arkansas, in his official capacity, and their successors,

Petitioners,

—v.—

LITTLE ROCK FAMILY PLANNING SERVICES, P.A.; CURTIS E. STOVER, M.D.; FAYETTEVILLE WOMEN'S CLINIC; TOM TVEDTEN, M.D., on behalf of themselves and the Medicaid eligible women of the State of Arkansas to whom they provide health care,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, as the six federal courts of appeal to reach this issue have uniformly held, states that participate in the federal Medicaid program must cover all medically necessary abortions for Medicaid-eligible women for which federal funding is not proscribed.

Whether the lower court correctly declined to rewrite Arkansas Amendment 68 to remedy its inconsistency with federal law on the ground that to do so would have involved the court in legislating which is beyond its judicial role.

PARTIES TO THE PROCEEDING

Respondents are Little Rock Family Planning Services, P.A., Curtis E. Stover, M.D., Fayetteville Women's Clinic, and Tom Tvedten, M.D., on behalf of themselves and their patients.

Drs. Stover and Tvedten are individuals. Little Rock Family Planning Services, P.A., and Fayetteville Women's Clinic, Inc. are sole-shareholder corporations, with no parent or subsidiary companies.

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Respondents Little Rock Family Planning Services, P.A., *et al.* oppose the Petition for Writ of Certiorari, dated December 21, 1995, by petitioners Thomas Dalton, Director of the Arkansas Department of Human Services, Kenny Whitlock, Deputy Director of the Arkansas Division of Economic and Medical Services, Jim Guy Tucker, Governor of the State of Arkansas (together "petitioners"). Petitioners seek review of a decision of the United States Court of Appeals for the Eighth Circuit, issued July 25, 1995, affirming the judgment of the United States District Court for the Eastern District of Arkansas entered on July 25, 1994. The opinion of the court of appeals is reported at 60 F.3d 497 (8th Cir. 1995). *See* B-1.[1] The court of appeals consolidated the instant case with the nearly identical appeal from the United States District Court for the District of Nebraska in *Orr v. Nelson*, No. 4:CV94-3252, slip op. (D. Neb. Nov. 4, 1994). The district court's opinion is reported at 860 F. Supp. 609 (E.D. Ark. 1994). *See* C-1. A petition for certiorari by the defendants in *Orr v. Nelson* is now pending before this Court. *See Orr v. Nelson*, 60 F.3d 497 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3380 (U.S. Nov. 14, 1995) (No. 95-766).

ADDITIONAL PROVISIONS AT ISSUE IN THIS CASE

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or

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[1]Citations to the Appendix to the Petition for Certiorari are in the form "A-__"; those to the Appendix to this Brief are in the form "__a."

> which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994), provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

42 U.S.C. § 1396a(a)(10)(A) (1994) provides:

> A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title . . . .

42 U.S.C. §§ 1396d(a)(1)-(5) (1994) provide in relevant part:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital

> services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

COUNTERSTATEMENT OF THE CASE

On October 21, 1993, President Clinton signed into law the fiscal year 1994 appropriations bill for the Departments of Labor, Health and Human Services and Education, which includes the 1994 version of the "Hyde Amendment," an annual rider prohibiting federal reimbursement for abortions except in a narrow range of circumstances. *See* Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993). The 1994 Hyde Amendment, which appropriated federal funds for abortions necessary to save the life of the pregnant woman or when the pregnancy resulted from an act of rape or incest, marked a significant expansion in federal funding for abortion services. Between 1981 and 1993, the annual Hyde Amendment appropriated federal Medicaid funds for abortion services only when the pregnant woman's life was at risk. Despite vigorous attempts in Congress to amend it,[2] the 1995 Hyde Amendment is identical to the 1994 Hyde Amendment. *See* Pub. L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).

This case was commenced on November 8, 1993, seeking declaratory and injunctive relief barring enforcement

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[2]*See* note 4, *infra*.

of Amendment 68 of the Arkansas Constitution, and the provisions of the Arkansas state plan that relate to abortion funding (together, the "challenged provisions"), for so long as Arkansas receives federal Medicaid funding. The challenged provisions would deny Arkansas Medicaid recipients coverage for abortions except when necessary to save a pregnant woman's life. Respondents claimed that, pursuant to the Supremacy Clause of the United States Constitution, the challenged provisions must be enjoined because they directly conflict with federal law which, as of the outset of the 1994 federal fiscal year, mandates Medicaid coverage for abortions for rape and incest victims.

On July 25, 1994, the district court granted respondents' motion for summary judgment, ruling that Amendment 68 contravenes the Supremacy Clause of the U.S. Constitution because it conflicts with federal law, which -- as of October 1, 1993 -- requires state Medicaid programs to pay for abortions for pregnant rape and incest victims, as well as women whose lives are threatened by the pregnancy. The district court also concluded that it could not cure Amendment 68's invalidity by writing in additional exceptions for rape and incest victims because doing so would "involve th[e] Court in positive legislative enactment clearly beyond the scope of its judicial role." *Valley Family Planning v. State of North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981). Finally, the district court held that all three sections of Amendment 68 must be permanently enjoined as a result of the invalidity of the public funding ban because that section is the "core" provision of Amendment 68, *Handy Dan Improvement Ctr. v. Adams*, 633 S.W.2d 699 (Ark. 1982), and was the "bait" that enticed voters to vote for the Amendment. *United States Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994), *aff'd on other grounds*, 115 S. Ct. 1842 (1995). *See* C-1.

Immediately after the district court's judgment was issued, petitioners sought a stay of the judgment pending appeal. The district court denied this motion and in so doing reaffirmed that Amendment 68 is "null, void and of no effect." *See* D-1.

On July 26, 1994, petitioners filed a Notice of Appeal of the district court's judgment. The United States Court of Appeals for the Eighth Circuit consolidated this appeal with the appeal in *Orr v. Nelson*. On July 25, 1995, the United States Court of Appeals for the Eighth Circuit affirmed the district court in all respects. The ruling was unanimous with respect to the district court's ruling that the Arkansas Medicaid program must cover abortions for low-income rape and incest victims for so long as it participates in the Medicaid program. *See* B-1. One judge dissented with respect to the district court's decision not to rewrite Amendment 68 to cure its invalidity. *Id.* Arkansas's petition for rehearing was denied on September 22, 1995. *See* A-1.

REASONS FOR DENYING THE WRIT

Petitioners' request for a writ of certiorari must be denied because they have failed to establish any of the factors that weigh in favor of granting the petition. Petitioners do not claim that the decision of the court of appeals is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Nor could they. Indeed, the decision of the court below is in complete harmony with the decisions of the United States courts of appeals for the First, Third, Fifth, Seventh and Tenth Circuits, as well as six recent decisions of United States district courts that have not been appealed or in which appellate rulings have not yet been rendered. On this issue, which has been litigated

extensively in the federal courts over the last fifteen years, there is no standing contrary precedent.

Petitioners argue that the petition should be granted because the court below "decided an important question of federal law which has not been, but should be, settled by this Court," Sup. Ct. R. 10.1(c), and "to correct the judicial overreaching" of the lower court. Pet. at 10. Petitioners are incorrect on both counts. First, petitioners misinterpret this Court's ruling in *Harris v. McRae*, 448 U.S. 297 (1980), which strongly supports the result reached by the lower court. Second, petitioners err in characterizing the lower court's decision not to redraft a state constitutional amendment as "judicial overreaching." The lower court's decision was the essence of judicial restraint; judicial overreaching would occur if -- as petitioners urge -- a federal court engaged in legislating by redrafting a state constitutional provision to remedy its inconsistency with federal law.

Moreover, because the lower federal courts have reached a uniform result in the numerous cases addressing the precise issue raised here, and this Court has already denied a writ of certiorari in three of those cases, there is no compelling reason for this Court to use its limited resources to review this matter. The petition must therefore be denied.

I. THE LOWER FEDERAL COURTS HAVE UNIFORMLY AGREED THAT STATE MEDICAID PROGRAMS MUST COVER ABORTIONS FOR WHICH FEDERAL FUNDING IS NOT PROSCRIBED

The lower court's decision ordering the Arkansas medical assistance program (so long as it participates in the

federal Medicaid program) to cover abortions for rape and incest victims for so long as federal funding is not proscribed for such procedures, is in complete accord with every standing decision of the federal appellate and district courts to decide this question. *See Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995), *reh'g denied*, No. 94-30445, 1995 LEXIS U.S. App. 33214 (5th Cir. Oct. 17, 1995); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 177 (3d Cir. 1995), *reh'g en banc denied*, No. 94-1954 (3d Cir. Aug. 24, 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 22, 1995) (No. 95-820);[3] *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980); *Reproductive Health Services v. Freeman*, 614 F.2d 585, 596 (8th Cir.), *vacated on other grounds*, 449 U.S. 809 (1980); *Zbaraz v. Quern*, 596 F.2d 196, 199 n.7 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *Hodgson v. Board of County Comm'rs, County of Hennepin*, 614 F.2d 601, 605 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Utah Women's Clinic, Inc. v. Graham*, 892 F. Supp. 1379, 1384 (D. Utah 1995); *Fargo Women's Health Org. Inc. v. Wessman*, No. A3-94-36, slip op. at 25 (D.N.D. Mar. 15, 1995), *stay pending appeal denied*, No. 95-1920NDF (8th Cir. June 12, 1995); *Stangler v. Shalala*, No. 94-4221-CV-C-5, slip op. at 11 (W.D. Mo. Dec. 28, 1994); *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638, at *3 (N.D. Ill. Dec. 6, 1994); *Planned Parenthood Affiliates of Michigan v.*

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[3] In their petition for certiorari, the petitioners in *Blackwell* do not contest "that States are required to fund those abortions for which federal reimbursement is available under the Hyde Amendment." Petition for Certiorari at 10, *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995) (No. 95-820); *id.* at 10 n.6 (noting that petitioners do not raise this issue).

Engler, 860 F. Supp. 406, 410 (W.D. Mich. 1994), *stay pending appeal denied*, Nos. 94-1913 & 94-2097 (6th Cir. Jan. 20, 1995), *appeal and cross-appeal pending*, Nos. 94-1913 & 94-2097 (6th Cir. argued Oct. 13, 1995); *Planned Parenthood of Missoula Inc. v. Blouke*, 858 F. Supp. 137, 142 (D. Mont. 1994); *see also Hope v. Childers*, No. 3:95CV-518-S (W.D. Ky. July 28, 1995) (order granting preliminary injunction); *Jeanette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. June 1, 1994) (annexed as an Appendix to the district court's opinion in *Little Rock Family Planning Services, P.A. v. Dalton*, 860 F. Supp. 609, 628 (E.D. Ark. 1994)) (state court preliminary injunction prohibiting Montana from denying Medicaid coverage for abortions for rape and incest victims).

In three of these cases -- *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3397 (U.S. Dec. 4, 1995); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979) -- this Court denied petitions for certiorari. Indeed, in denying an application for a stay pending appeal in *Hope Medical Group for Women v. Edwards*, 115 S. Ct. 1 (1994) (Scalia, Circuit Justice), Justice Scalia recognized that:

> [t]he Courts of Appeals to address th[e] question [of whether Title XIX requires States participating in the Medicaid program to fund abortions unless federal funding for those procedures is proscribed by the Hyde Amendment] have uniformly supported that premise . . . . We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on the Title XIX question unless

> and until a conflict in the Circuits appears.

115 S. Ct. at 2 (citations omitted). No conflicts in the Circuits having appeared, this Court should follow Justice Scalia's well-grounded reasoning and deny this petition.

II. THE LOWER COURT'S DECISION IS CONSISTENT WITH THE STRUCTURE OF THE FEDERAL MEDICAID ACT, THIS COURT'S DECISION IN *HARRIS v. MCRAE*, AND THE ADMINISTRATIVE AGENCY'S INTERPRETATION

Not only have the lower federal courts been uniform in their treatment of the question presented for review, the result they have reached is supported by the structure of the federal Medicaid Act, this Court's decision in *Harris v. McRae*, and the guidance of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services ("HHS"), which is charged with overseeing the federal Medicaid program.

A. The Structure of the Medicaid Act and *Harris v. McRae* Support the Result Reached by the Lower Court

The federal Medicaid program (established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u (1994)) is a federal-state cooperative program that enables participating states, with the aid of federal funds, to provide medical services to needy individuals. "Although participation in [Medicaid] is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Virginia Hospital Ass'n*, 496

U.S. 498, 502 (1990).

Under Title XIX, certain categories of medical care are "mandatory," and must be provided by every state Medicaid program. *See* 42 U.S.C. § 1396a(a)(10)(A) ("A State plan for medical assistance must provide for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5) . . . of section 1396d(a) of this title."). The mandatory categories of care include:

> (1) inpatient hospital services (other than services in an institution for mental diseases); (2)(A) outpatient hospital services . . . ; (3) other laboratory and X-ray services; (4)(A) nursing facility services . . . ; (B) early and periodic screening, diagnostic and treatment services . . . for individuals . . . under the age of 21; (C) family planning services . . . ; (5)(A) physicians' services furnished by a physician . . . .

42 U.S.C. §§ 1396d(a)(1)-(5). A state plan must cover medical services that fall within the mandatory categories of care which an individual's physician certifies as "medically necessary." *See Weaver v. Reagen*, 886 F.2d 194, 200 (8th Cir. 1989) (Medicaid must cover medically necessary AZT treatments); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (Medicaid must cover medically necessary sex reassignment surgery); *Allen v. Mansour*, 681 F. Supp. 1232, 1237-38 (E.D. Mich. 1986) (Medicaid must cover medically necessary liver transplant surgery), *appeal dismissed and order vacated as moot*, 1991 U.S. App. LEXIS 4710 (6th Cir. Mar. 19, 1991).

Because abortion falls within several of the categories

of mandatory covered services identified in 42 U.S.C. § 1396d(a) -- "family planning services," "physicians' services," "outpatient hospital services," "inpatient hospital services" -- between 1973 and 1976, state Medicaid programs were required to cover medically necessary abortions. As the Court of Appeals for the Eighth Circuit held in *Hodgson*, "[w]e think it plain that [Medicaid's mandatory services] include medical procedures to induce abortions." 614 F.2d at 607. *See also Doe v. Busbee*, 481 F. Supp. 46, 49 (N.D. Ga. 1979) ("[a]bortion is a medical service which falls within one or more of the five categories of medical service which must, as a minimum, be provided under a state's plan for medical assistance"); *Emma G. v. Edwards*, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (state of Louisiana stipulated that medically necessary abortions were covered under Title XIX); *Coe v. Hooker*, 406 F. Supp. 1072, 1082-83, 1086 (D.N.H. 1976) (medically necessary abortions are a covered service under Medicaid); *Dodge v. Department of Social Services*, 657 P.2d 969, 974 (Colo. Ct. App. 1982) ("abortion is a medical procedure . . . . When performed by physicians, this medical procedure necessarily involves physician services. It may also involve inpatient or outpatient hospital services, or both, as well as other statutorily defined categories of authorized medical services in some circumstances").

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Each year since 1976, Congress has added a "Hyde Amendment" to annual appropriations bills for the U.S. Department of Health and Human Services. The circumstances in which federal funds have been appropriated for low-income women's abortions have varied. Between fiscal years 1982 and 1993, the Hyde Amendment limited federal funding for abortions to

situations where the life of the pregnant woman would be threatened by carrying the pregnancy to term.[4]

In 1980, in *Harris v. McRae*, this Court upheld, against statutory and constitutional challenge, congressional restrictions on federal funding of abortion services for the poor. *McRae* directly supports the result reached by the lower court here. In challenging the Hyde Amendment, the plaintiffs in *McRae* argued that despite the withdrawal of federal funds for non-lifesaving abortions, state Medicaid programs continued to be obligated under Title XIX to cover all medically necessary abortions, even if they had to pay for the procedures entirely with state funds. *See McRae*, 448 U.S. at 307-08 ("[i]t is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating State of its duty under Title XIX to provide for such abortions in its

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[4]For several years the Hyde Amendment contained a proviso explicitly giving state Medicaid programs the option not to cover even those abortions for which federal funding was available. The provision stated: "Provided, however, That the several States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352, 1353 (1980); Pub. L. No. 96-536, § 109, 94 Stat. 3166, 3170 (1980); Pub. L. No. 97-12, §§ 401-02, 95 Stat. 14, 95-96 (1981); Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982). This "state-option" proviso to the Hyde Amendment has not been enacted since 1982, although it was proposed and rejected in 1995. *See* Jerry Gray, *The 104th Congress: Spending Cuts*, N.Y. Times, March 3, 1995, at A-19 (discussing amendment added by House Appropriations Committee to budget rescissions bill, which would have given states the option of not covering Medicaid abortions for rape and incest victims); David E. Rosenbaum, *House Committee Supports Tax Cut*, N.Y. Times, March 15, 1995, at A-1 (reporting that the "state option" Medicaid abortion provision had been eliminated from the rescissions bill).

Medicaid plan"). This Court rejected that argument, holding that Congress "did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan." *Id.*, at 309. It stated: "Title XIX does not require a participating State to pay for *those* medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." *Id.*, at 311 (emphasis added).

The plain implication of this Court's holding in *McRae* is that Title XIX requires states to cover those medically necessary abortions for which the funding obligation is not "unilateral," 448 U.S. at 309, and for which federal reimbursement *is* available under the Hyde Amendment. In other words, to the extent that federal funding for medically necessary abortions is not proscribed by the Hyde Amendment, participating states are obligated to continue covering medically necessary abortions, as they did before the Hyde Amendment was enacted.

B. HCFA's Directive to State Medicaid Directors Supports the Lower Court's Decision

Concurring with this analysis, on December 28, 1993, the director of the Medicaid Bureau of HCFA advised state Medicaid directors that, effective October 1, 1993, all state medical assistance plans must cover abortions for which federal funds are appropriated under the current Hyde Amendment (the "HCFA Directive"). *See* 1a. In relevant part, the HCFA Directive provides:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to

> save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided . . . . [W]e believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

2a. HCFA's interpretation of participating states' obligations under the Hyde Amendment and Title XIX is entitled to substantial deference by this Court. *See National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reasonable agency determination must be accorded "considerable weight").

C. Because the Challenged Provisions Directly Conflict with Federal Law, the Supremacy Clause Requires That They Be Enjoined

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338,

346-47 (1975) (New York regulations reducing shelter allowance to AFDC recipients are invalid because they conflict with Title XIX and federal regulations). Because Title XIX and the 1994 and 1995 Hyde Amendments, when read together, mandate coverage of abortions for low-income rape and incest victims -- which the challenged provisions prohibit -- the Supremacy Clause requires invalidation of the challenged provisions; this is precisely what the lower court here held.

III. THE LOWER COURT CORRECTLY DECLINED TO REWRITE AMENDMENT 68

The lower court correctly found that the "district court did not err in invalidating the entire Arkansas state constitutional amendment and in declining to rewrite the amendment to cure the validity." See B-12. As the court explained, "[r]edrafting the amendment or writing in exceptions in order to cure the invalidity presented by the plain meaning of its language would have involved the district court in "'positive legislative enactment clearly beyond its judicial role.'" *See* B-12 (quoting *Valley Family Planning*, 661 F.2d at 102).

The lower court's decision is entirely consistent with several of this Court's decisions. For example, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), this Court held that the Oklahoma Habitual Criminal Sterilization Act violated the Equal Protection Clause because revenue act offenses such as embezzlement were not punishable by sterilization, whereas similar crimes were. The Court, however, refused to rewrite the law to expand its coverage to embezzlers, instead leaving it to Oklahoma to decide whether to so expand the law's coverage. *Id.* at 543. Likewise, in *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court

struck down Maryland's motion picture censorship statute because it did not provide adequate safeguards against inhibition of speech, but refused to rewrite the statute concluding that "[h]ow or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." *Id.* at 60. *See also Chapman v. United States*, 500 U.S. 453, 464 (1991) (statutory canons admonishing courts to avoid unconstitutional statutory constructions, are "not a license for the judiciary to rewrite language enacted by the legislature") (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements").

The lower court's decision is also consistent with other lower court precedent. For example, in *Valley Family Planning*, the Court of Appeals for the Eighth Circuit invalidated a North Dakota statute that restricted state and local funding for any agency that performs, refers, or encourages abortion because the prohibition conflicted with Title X of the federal Public Health Service Act, which requires grantees to make referrals for abortion when the pregnant woman's life is at risk. Precisely as it did in the instant case, the court of appeals refused to rewrite the North Dakota statute to add an exception for abortion referrals for life-threatening pregnancies or to delete the ban on referrals while leaving the ban on performing or encouraging abortions intact. Rather, it held:

> We are not inclined to cure the invalidity of [the impermissible statute] by writing in exceptions to its referral prohibition; that would involve this Court in positive legislative enactment *clearly beyond its judicial role*.

Valley Family Planning, 661 F.2d at 102 (emphasis added) (citation omitted).

The lower court's ruling is also supported by the decision of the Court of Appeals for the Third Circuit in *Roe v. Casey*, 623 F.2d 829, 837 (3d Cir. 1980), that it could not rewrite a Pennsylvania Medicaid abortion restriction to bring it into compliance with federal law. The Third Circuit explained:

> [t]here is nothing in the record to indicate what course Pennsylvania would choose to follow given the amendment to Title XIX by the Hyde enactment and we are not free to substitute our speculation for the judgment of the duly constituted officials of the state. *This court should refrain from acting on a "matter which properly requires the exercise of policy judgment by the legislature."*

623 F.2d at 837-38 (emphasis added) (citation omitted).

Underlying the well-established prohibition on judicial rewriting are the principles of comity and federalism that counsel federal courts to respect state sovereignty when fashioning equitable remedies with respect to invalid state laws. In *Eubanks v. Wilkinson*, 937 F.2d 1118 (6th Cir. 1991), for example, the Court of Appeals for the Sixth Circuit reversed a district court's attempt to rewrite a Kentucky parental consent abortion statute to save it from unconstitutional vagueness, holding that the district court could "not supply new limiting language for a state statute to create constitutionality." *Id.*, 937 F.2d at 1120. Explaining its conclusion, the Sixth Circuit held: "the general federal rule is that courts do not rewrite statutes to

create constitutionality." 937 F.2d at 1122. It further explained:

> In this case we must weigh both the need to keep legislative and judicial power separate and the need to respect state judicial policy regarding revision of state statutes. In applying the doctrine of judicial review, our jurisprudence in this area of interpretation stresses both separation of powers and federalism concerns. . . .
>
> . . .
>
> [i]t is not the province of the court to . . . amend an invalid state statute, and the citizens of a state should not be required to look to federal court decisions to determine the language of the statute or amendments to it. . . .
>
> . . .
>
> We conclude that while a federal court may enjoin the operation of some provisions of state statute and leave others to operate, it cannot itself draft a new limiting condition, thus reframing the statute.

Id., 937 F.2d at 1127-28.

Rewriting is particularly inappropriate where, as here, a constitutional amendment passed by voter initiative is at issue, *see Faubus v. Kinney*, 389 S.W.2d 887, 892 (Ark. 1965) (in fashioning relief when part of a constitutional amendment is invalid, the "intent of the people is controlling"), and there are numerous ways to conform state

and federal laws.[5] The district court correctly held that:

> The Court has no way of knowing how the people will resolve these detailed questions. . . .
>
> The people of Arkansas may choose to opt out of the Medicaid program entirely, or they may choose to adopt an expanded version of Amendment 68. Arkansas voters may extend coverage for medically necessary abortions to cases where there are fetal anomalies or where the woman's health would incur serious damage, or alternatively, they may choose to confine the state to the minimum provisions that

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[5]As the district court correctly noted:

> It is not possible for this Court to divine all the details involved regarding how Arkansas would wish to [conform Amendment 68 to federal law], for the extension of coverage raises several issues. Plaintiff[s] point[] out that the relevant issues would include: whether Medicaid coverage would be based upon a reporting or documenting of the rape or incest; whether there would be a time limit on the reporting requirement; to whom would the report be addressed; would the confidentiality of the reporting woman or girl be protected; would the burden of reporting be on the woman or girl, or her doctor; would the victim have to name the perpetrator in the report; would waivers of the reporting requirement be authorized; and how would rape and incest be defined for purposes of Medicaid reimbursement.

C-25-26.

must be covered, as mandated in the Hyde Amendment. This Court takes no position, of course, on any of these questions, and cannot know how the voters will choose to respond to the situation created by Amendment 68's conflict with federal law. Pursuant to its appropriate judicial role, the Court concludes that the Amendment must be stricken in its entirety, to enable the people or their elected representatives to decide how Arkansas will cover abortion in the state Medicaid program so that it will not conflict with federal law.

C-26.

In addition, Amendment 68, Section 3's mandate that the provision will "not . . . require an appropriation of public funds" is further reason that Section 1 cannot be rewritten to conform it to federal requirements. As petitioners admitted during this litigation, providing abortion coverage for rape and incest victims would require an appropriation of public funds. Thus, rewriting Amendment 68, Section 1 to bring it into compliance with federal law would violate Amendment 68, Section 3. Averting conundrums such as this is precisely why federal courts should refrain from rewriting state constitutional provisions. As this Court held in *Freedman v. Maryland*, "[h]ow or whether [Arkansas] is to incorporate the required [funding for abortions for rape and incest victims] is, of course, for the State to decide." *Id.*, 380 U.S. at 60.

CONCLUSION

Although this Court has not squarely ruled on whether state Medicaid programs must cover all abortions for which

federal funds are available, there is no reason for it to use its limited resources to do so. The lower court's ruling is in harmony with every standing federal decision on this issue, is supported by this Court's prior related decision in *Harris v. McRae*, as well as by the federal Medicaid Act and the HCFA Directive. Likewise, this Court should not use its limited resources to review the lower court's restrained decision not to rewrite a state constitutional amendment to bring it into compliance with federal law, precisely as this Court has done on several occasions. For the reasons stated herein, the petition for a writ of certiorari must be denied.

Dated: January 5, 1996

Respectfully submitted,

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APPENDIX

Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, United States Department of Health and Human Services to State Medicaid Directors

December 28, 1993

Dear State Medicaid Director:

The purpose of this letter is to notify you about a recent Congressionally enacted revision to the "Hyde Amendment" which affects the Medicaid program and to tell you how this revision in the law is to be implemented.

Effective October 1, 1993, as part of P.L. 103-112, the Health and Human Services Appropriation bill, Congress passed a revision of the Hyde Amendment pertaining to Federal funding of abortions under the Medicaid program. As enacted, the provision states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Thus, Federal funding (FFP) is now available for abortions performed to save the life of the mother or to terminate pregnancies resulting from rape or incest when the claim for such an abortion is paid by the State on or after October 1, 1993. Please note that it is the date that the State pays the claim and not the date of the service which determines the availability of FFP.

In order to implement this provision of the law, we are requesting that beginning with the first Quarterly Expenditure Report (HCFA-64) for fiscal year (FY) 1994 in January, States submit to the Health Care Financing Administration (HCFA) regional office (RO) a form certifying the number of abortions performed to save

the life of the mother, the number performed for a pregnancy resulting from an act of rape, and the number performed for a pregnancy resulting from an act of incest. This certification should be submitted to the RO on a quarterly basis with the completed HCFA-64.

Current regulations at 42 CFR 441.203 and 441.206 require that before FFP can be made available, the State must obtain a signed physician's certification that, based on the professional judgment of the physician, the abortion was necessary because "the life of the mother would be endangered if the fetus were carried to term." Because the language of the current Hyde Amendment differs somewhat from its predecessors, the State must change the wording of the physician's certification to comport with the current statutory language. With regard to this portion of the Hyde Amendment, the new legislative language, "to save the life of the mother," has essentially the same meaning as the previous legislation.

As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

The definition of rape and incest should be determined in accordance with each State's own law. States may impose reasonable reporting or documentation requirements on recipients

or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies resulted from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement.

State which have State Plan language more restrictive than that provided for under the revised Hyde Amendment may qualify for Federal funding for the first quarter of FY 94 if they submit approvable State Plan language changes by December 31, 1993.

By March 31, 1994, all States must ensure that their State Plans do not contain language that precludes FFP for abortions that are performed to save the life of the mother or to terminate pregnancies result from rape or incest.

As you know, it is necessary for States to adhere to all conditions for Federal Medicaid funding. As part of its ongoing State assessment and audit programs, HCFA may include reviews of abortion claims, if necessary, to assure compliance with these conditions.

Please call my office if you have any questions about this matter.

Sincerely yours,
/s/ SALLY K. RICHARDSON
Sally K. Richardson
Director
Medicaid Bureau

cc: All Regional Administrators